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No. 1085

Supreme Court of the United States

OCTOBER TERM, 1924.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York.

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Supreme Court of the United States

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

Notice of Application for Certiorari

To HON. JAMES M. BECK, Solicitor General,
Washington, D. C.

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above named petitioner, will present the annexed petition for a writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, April 27, 1925, at the opening of court on that day or as soon thereafter as counsel can be heard, and will ask for the relief prayed for therein and for such other and further relief in the premises as may be just.

Yours respectfully,

GODFREY GOLDMARK,
Counsel for Petitioner,
No. 74 Broadway,
New York City.

Date, April 13, 1925.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM 1924

MIDDLETON S. BORLAND, as Trustee in bankruptcy of Knauth, Nachod & Kuhne, Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Middleton S. Borland, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, respectfully shows:——

I.

Nature of Proceeding and Decision below,

On June 15, 1923, a petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Oscar L. Gubelman, *et al.*, individually and as co-partners constituting the firm of Knauth, Nachod & Kuhne, and thereafter such proceedings were had in the said District Court that your petitioner was duly elected trustee of the said individuals and of the said partnership.

In the said bankruptcy proceeding the Postmaster General of the United States, for and on behalf of the United States, filed a claim in the sum of $148,403.02,

based upon certain drafts purchased by the Post-Office Department from the bankrupt firm prior to the bankruptcy, which drafts were outstanding and unpaid when the petition was filed. Priority in the payment of said claim was demanded, upon the ground that the United States of America was entitled to the payment of its claims prior to the payment of claims of ordinary creditors, in pursuance of the provisions of Section 64 (b) (5) of the Bankruptcy Act. The Trustee objected to the claim as excessive in amount and upon the ground that the claimant was not entitled to priority. The Referee reduced the claim to the sum of $147,462.32 and allowed it as a priority claim at that amount. The order of the Referee was successively affirmed by the District Court for the Southern District of New York and by the Circuit Court of Appeals for the Second Circuit, upon authority of the decision in *Matter of Tidewater Coal Exchange,* 280 *Fed.* 648, decided by the said Circuit Court of Appeals, in which it was held that the United States of America is entitled to priority in bankruptcy for ordinary contract debts over the general creditors of the bankrupt, because it is a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act.

II.

Conflict between Circuit Courts of Appeals.

In the Circuit Court of Appeals for the Fourth Circuit in the case of *Davis Federal Agent* vs. *Pringle Trustee* 1 F. (2d) 860, it was held that the United States of America is **not** entitled to priority in the payment of its contract debts ahead of ordinary private creditors of the bankrupt, because it is *not* a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act. **An application for a certiorari to review the decision in that case was granted by this Court on March**

2, 1925, and the case is pending undetermined in this Court.

In the opinion in *Davis* vs. *Pringle*, it is pointed out that the decision is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the Matter of Tidewater Coal Exchange above referred to.

In *United States S. B. E. F. Corp.* vs. *Roger B. Wood, as Trustee in Bankruptcy of the Eastern Shore Shipbuilding Corporation*, decided by this court in May, 1922, 258 U. S., 549, six of the Justices of this court were of the opinion that the Fleet Corporation was not such a governmental agency that a debt due to the Fleet Corporation was a debt due to the United States and therefore said Justices held the debt of the Fleet Corporation there involved was not entilted to priority in bankruptcy and accordingly they did not pass upon the question whether a debt due the United States was entitled to such priority. The Chief Justice and Justices Vandevanter and Clarke dissented from the conclusion that the Fleet Corporation was not a governmental agency, but they concurred in the *conclusion* that the debt was not entitled to priority in bankruptcy, even if deemed due the United States because they agreed with the contention of the Trustee* that the statute as to preferences in bankruptcy did not extend to claims of the United States, except those for taxes (258 U. S., at top of page 574).

III.

Important reasons why this Court should allow the writ.

By its allowance of the writ of certiorari in *Davis* vs. *Pringle* involving the precise question here presented, this court has already determined that the question of

*Counsel for the Trustee in that case was the same as in the present case.

the government's priority is of such grave importance that it should be passed upon by this court, so that it seems unnecessary to advance further argument in support of that contention. **Your petitioner submits, however, that unless a writ of certiorari is granted *in this case*, your petitioner will not obtain any benefit from the decision of this court in *Davis* vs. *Pringle*, even if adverse to the claim of the United States, inasmuch as the decision of the Circuit Court of Appeals in the present case is final and will not be affected by any decision made by this court in the said case of *Davis* vs. *Pringle* unless this application is granted.** Your petitioner, therefore, submits that for the protection of his rights and the rights of the general creditors of the bankrupt, the writ of certiorari should be granted in this case, to the end that this case may be heard together with the said case of *Davis* vs. *Pringle* in this court.

Your petitioner further shows that the said case of *Davis* vs. *Pringle* involves a claim for the sum of $2,213.70, whereas the claim in the present case is for the sum of $147,462.32.

WHEREFORE because of the gravity and importance of the question presented and the necessity of avoiding conflict between the Circuit Courts of Appeals and in order to enable your petitioner to obtain any benefit from a decision adverse to the Government in the said case of *Davis* vs. *Pringle* involving the question here presented and in which a writ of certiorari has already been granted by this court, your petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this court a transcript of the record of the proceedings in this case, to the end that the decree of said court may be reviewed

with the said decree in *Davis* vs. *Pringle,* and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

MIDDLETON S. BORLAND,
as Trustee in Bankruptcy of Knauth, Nachod & Kuhne.

STATE OF NEW YORK, }
County of New York, } ss.:

MIDDLETON S. BORLAND, being duly sworn, deposes and says as follows:

I am the Trustee in Bankruptcy of Knauth, Nachod & Kuhne. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

MIDDLETON S. BORLAND.

Sworn to before me this
13th day of April, 1925.

JOHN E. McGUIRK,
Notary Public, Bronx County,
Certificate filed New York County.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

GODFREY GOLDMARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Question Involved.

The question involved is whether the United States is a "person" within the meaning of Section 64 (b) (5) of the Bankruptcy Act, which Section is as follows:—

> (a) The court shall order the trustee to pay all *taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.
>
> (b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of

the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and milage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the Court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) *debts owing to any person who by the laws of the States or the United States is entitled to priority.*

POINT I.

The United States obtains its priority, if any, from the Bankruptcy Act of 1898, and is bound by its provisions.

Under the Act of 1867, it was held in the *Lewis* case, 92 U. S., 618, that the priority of the United States arose under an Act of 1797, now Revised Statutes 3466, and that the priority created by the Bankruptcy Act was simply a precaution to reaffirm the priority of the Government in bankruptcy proceedings.

Under the Act of 1898, however, it has been held that the United States is bound by the provisions of the Bankruptcy Act, and that whatever priority it has for the payment of its ordinary debts, must be created by that Act. It was for that reason that the Circuit Court of Appeals held in *U. S.* vs. *Wood* as trustee, 290 Fed. 109, and that

this Court concurred (263 U. S., 680) that the plenary suit in equity to charge the assets for a debt due the United States could not be maintained by virtue of R. S. 3466, although it could be maintained under the Act of 1867.

Therefore, there remains simply the question whether or not the Bankruptcy Act of 1898 does in fact create a priority in favor of the United States for ordinary debts. Concededly, it does not create such a priority in so many words. The narrow question is whether under the provisions of 64b(5) the United States itself is a "person," so that it is entitled to priority, because such priority is created by a "law of the United States," to wit: R. S. 3466.

POINT II.

The Bankruptcy Act of 1898 contains no express grant of priority to the United States eo nomine for an ordinary indebtedness, and the history of that act and of the earlier Bankruptcy Acts shows that the word "person" as used in Section 64 of the present act includes only private creditors and was not intended to include the United States itself; and therefore that R. S. 3466 is not incorporated into the act by reference.

It is impossible to construe the Act of 1898 without a consideration of the earlier Bankruptcy Acts and the history of the bills which led up to the enactment of the present Act. It is this procedure which this Court followed in the *Title Guarantee* case, 224 U. S. 152 and in *Schall* vs. *Camors*, 251 U. S. at 250.

The Bankruptcy Act of 1800.

Prior to 1800 Congress had not exercised its delegated power to pass a bankruptcy statute, but it had provided by Section 5 of the Act of March 3, 1797 (1 Stat. 512) as follows:

> "And be it further enacted, that where any revenue officer, *or other person* hereafter becoming indebted to the United States, by bond *or otherwise*, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The act of bankruptcy therein referred to evidently referred to acts under State statutes.

The first Bankruptcy Act passed in 1800 provided (2 Stat. 19, 36):

> "And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them."

This provision was construed in *United States* vs. *Fisher*, 2 Cranch, 358, where the Court held that the purpose of the foregoing provision was simply to continue

in a Federal bankruptcy providing the priority which had been granted to the United States by the Statute of 1797. Thus the Act of 1800 did not itself *create* a priority for the United States, nor did it create any priority for private creditors who might be accorded preference under the laws of the United States or of the States.

This Act, 5 Stat. 440, 445, provides:

The Bankruptcy Act of 1841.

"SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debt due by him to **persons who, by the laws of the United States, have a preference,** in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars. Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer." * * *

In this act is found for the first time the phrase which s the basis of the Government's claim.

This Act, it will be noted, provided that the creditors roving their debts should be entitled to no priority except (1) debts due to the United States, (2) debts due to ersons who by the laws of the United States were entitled to a preference in consequence of having paid noney as sureties and (3) to wage earners for amounts ot exceeding $25.00. In other words, there priority was xpressly granted to the United States for its debts, and

in addition priority was granted to persons who under the laws of the United States were subrogated to the rights of the United States under the Statute of 1797, now R. S. 3468, and also to a limited class of wage earners. It is entirely clear, therefore, that under this Act of 1841, the word "persons" did not include the United States itself. It is also to be noted that there was no priority granted to private creditors of the bankrupt other than sureties, even if granted priority under the laws of the United States or of the States. This provision of the Act does not seem to have been interpreted and the Act itself was repealed in 1843.

The Bankruptcy Act of 1867.

This Act (March 2, 1867), 14 Stat. 530, C. 176, indicates clearly that Congress had in mind the distinction between ordinary debts due to the United States, moneys due as taxes and assessments, claims of wage earners, and also debts due to all persons, i. e., private creditors, who by the laws of the United States were or might be entitled to priority. In Section 28 of that Act it was provided as follows:

> "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:
>
> First.—The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second.—All *debts* due to the *United States, and all taxes* and assessments under the laws thereof.
>
> Third.—All debts due to the State in which the proceedings in bankruptcy are pending, and all

taxes and assessments made under the laws of such state.

FOURTH.—Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

FIFTH.—All debts due to any *persons*, who by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed; always provided, that nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or of any State."

Here is a clear recognition of the distinction between debts and taxes due to the United States and debts due to "persons" who by the laws of the United States were or might be entitled to priority. It needs no argument to show that in view of the fact that there was an express provision with respect to *debts* (other than taxes) due to the United States in subdivision 2nd, that the word "persons" in sub-division 5 was not intended to include the United States itself.

In *Lewis* vs. *United States*, 92 U. S., 618, the Supreme Court considered the relation between the above provision of the Act of 1867 and the Statute of 1797, and the Court said, with respect to the priority of the United States itself, after quoting Section 28 of the Act of 1867:

> "The clause above quoted is in *pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

It is clear, therefore, that under the Act of 1867 Congress, as it had done in each of the prior Acts, expressly reaffirmed the priority of the United States over all indebtedness, and made applicable to bankruptcy proceedings the priority created by the Statute of 1797. In addition it extended and created priority in favor of certain "persons," that is to say, in favor of certain private creditors, whose claims were thus preferred after the debts of the United States and certain other indebtedness.

Certainly in the light of the continued policy of Congress in these three bankruptcy Acts specifically to reaffirm or recreate in bankruptcy the priority of the United States over the ordinary debts and separately to provide for the priority of certain "persons," it cannot be presumed that when Congress copied into the Act of 1898 the provision granting a priority to certain "persons" and deliberately omitted in the final enactment of the statute a priority for the *debts* of the United States, expressly limiting the priority to taxes, that it was intended by *mere implication to extend* the meaning of the word "persons" copied from the earlier acts to include not only private creditors but also the United States itself.

An analysis of the Act of 1898 shows the following:

Section 17 provides:

> "(*a*) A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a *tax* levied by the United States, the State, county, district or municipality in which he resides."

Section 57J provides as follows:

> "*Debts* owing to the United States, a State, a County, a district or a municipality as a penalty or forfeiture shall not be *allowed*, except for the

amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

In the foregoing provisions is found a distinct recognition of the existence of three classes of claims of the United States:

(A) Taxes;

(B) Debts owing as penalties;

(C) Debts generally.

Furthermore, debts owing to the United States are referred to in Section 57 and debts due any *person* entitled to preference by the laws of the United States are referred to in Section 64.

Having thus clearly indicated an intention that all classes of debts due the United States in bankruptcy are within the purview of and subject to the provisions of the Act, Congress in Section 64 provided for certain priorities.

In that Section again there is a clear distinction between taxes and debts. The order of priority is provided for as follows:

(*a*) All *taxes* due and owing to the *United States*, the State and political subdivision.

(*b*) Cost to preserve the estate.

(*c*) Filing fees and expenses of creditors who have recovered assets.

(*d*) Cost of administration.

(*e*) Wages.

(*f*) *Debts* owing to any *person* who by the laws of the States or the United States is entitled to priority.

Reading the Act alone, it appears that Congress had in mind the various classes of debts due to the United States and deliberately determined just what indebtedness of the bankrupt should be entitled to prior payment and that it concluded that ordinary debts due the United States should not be given such a priority and should be allowed and discharged as private debts.

It is apparent, therefore, that the whole claim to priority is bottomed upon the proposition that despite these explicit provisions and references to the United States, Congress by implication intended to *extend the meaning of the word "persons" to include the United States, although the same phrase in earlier acts clearly referred solely to private creditors, and that that extension of meaning was effectuated solely by means of the ambiguous definitions of terms used in the Act.*

It now will be shown that the history of the Act of 1898 negatives any such intention and affirmatively shows that the intention was to the contrary.

History of the Act of 1898.

The history of the Act in Congress substantiates this view:

For some years prior to 1898, there was an agitation for the enactment of the Bankruptcy Law. A bill was drawn by Judge Torrey, which was introduced in the House in the early '90s and considered at successive sessions of Congress. Finally Speaker Henderson introduced in the House (H. R., 8110) a bill, which embodied the essential provisions of the Torrey bill, and having been referred to the Judiciary Committee, it was favorably reported by that Committee on April 13, 1896 (Cong. Record, 54 Cong., 1 Sess., p. 3931).

That bill provided:

Section 64: *Debts which have Priority.*

(*a*) *Debts owing to the United States,* a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority **only in the event and to the extent that they constitute a lien upon the property of the estate.**

(*b*) The debts to have priority except as herein provided, and to be paid in full out of bankrupt estates and the order of payment shall be
* * *

5. Debts owing to any *person* who by the laws of the States or the United States is entitled to priority."

Clearly under this bill there was no intention to include the United States in the word "persons" for there was an express provision granting priority to "debts owing to the United States," limiting that priority, however, to those debts which constituted a lien. This priority was narrower than the priority eventually granted (for taxes of the United States only became a lien after they had been assessed and a demand made therefor. Revised Statutes, Section 3186, whereas under the Act as passed, all taxes are granted priority whether or not they have become a lien and similar state statutes existed).

In April, 1897, a similar bill was reported by the Senate Judiciary Committee. The bill, as reported, contained the following (Cong. Record, 55 Congress, 1st Session, pp. 601-609):

Section 65: Debts which have priority

(*a*) *Debts* owing to the United States, a State, County, Parish, being a political corporation, District, or Municipality, after being allowed, shall have priority *only in the event and to the extent that they constitute a lien upon the property of the estate.*

(*b*) 1, 2, 3 and 4 are like the present Section 64). "5. Debts owing to any person which by the laws of the United States, or a State are entitled to priority."

The bill was not enacted as reported but Senator Nelson on April 22, 1897, offered a substitute bill which passed the Senate on that day. That bill provided as follows (Cong. Rec., 55 Congress, 1st Session, p. 800):

"SEC. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to wit:

FIRST—Debts due to servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petition.

SECOND.—*Taxes* or *revenues* due the United States.

THIRD.—Taxes due any State or Territory or the District of Columbia.

FOURTH.—Taxes due any county, parish, etc."

This bill, it will be noted, extends the priority from debts, which are a lien, to all taxes, **but does not purport to create a priority for ordinary debts.**

That bill was referred to the House Committee and that body eventually reported back *another bill* (Congressional Record, 55th Congress, 2nd Session, pages 1777, 1784). That bill contained the provision as to priorities now contained in the act.

The bill passed the House and went to the Senate. Thereafter a conference committee agreed upon a bill which contained the same provision as in the House bill (Senate Document 294, 55th Cong. 2nd Session) and this bill became a law.

Thus it is apparent that while the bills as originally introduced created a priority for "debts" which were a lien, there was substituted for this provision in the Act as finally enacted a direction to pay taxes, but there was not inserted any provision creating a priority in the United States for ordinary debts or reaffirming the priority under the Statute of 1797 (now Revised Statutes 3466) as was done in all the prior Acts.

Summary of Historical Review.

From the foregoing discussion the following appears:

(*a*) The Act of 1800 specifically preserved the priority created by the Statute of 1797 and created no priority for persons, i. e., private creditors.

(*b*) The Act of 1841 again preserved or created a priority for debts due the United States *and in addition* created a priority for two classes of "persons" i. e., for private creditors who had priority under the laws of the United States as sureties for debtors of the United States, and for wage earners.

(*c*) The Act of 1867 "reaffirmed" in bankruptcy the priority granted by the Statute of 1797, and in addition *extended* the priority in bankruptcy to *all* persons, i. e., private creditors as were or might be entitled to priority under the laws of the United States thus including not only sureties but priority claimants under the laws of the District of Columbia and of the territories and any persons to whom priority might be granted thereafter by any Federal statute.

(*d*) The bills in Congress leading up to the Act of 1898 preferred "Debts owing to the United States," but only in the event and to the extent that they constituted a lien and by separate provision continued and extended the priority in bankruptcy to persons, i. e., private creditors

so as to include creditors entitled to priority not only under the laws of the United States but also under the laws of the States. This Act also discharges debts due the United States other than taxes and provides that debts for penalties are to be allowed only for the actual damage sustained.

In *Guarantee Co.* vs. *Title Guaranty Co.*, 224 U. S., 152, the Supreme Court said:

> "And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment."

As these changes were not inadvertent and the Act takes into consideration the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment, and as ordinary debts are discharged the intent of Congress is clear to curtail the rights of the Government and upon ordinary debts to place the Government upon the plane of an ordinary citizen. If the intention had been to give it priority for ordinary debts as distinguished from taxes, *it is not conceivable* that the draftsmen of the Torrey bill and the subsequent bills which led to the enactment of the Act of 1898 would have deliberately removed from the Act of 1867 the express priority for debts due the United States contained in Section 28 of the Act of 1867, and first would have limited such priority to "debts" which are a lien and finally to taxes. *If the intention was to continue the priority the language of the Act of* 1867 *would not have been eliminated and so important a right would not have been allowed to rest upon ambiguous definitions and implications.*

The draftsmen of the Act of 1898 were, of course, familiar with the decision in the *Lewis* case, 92 U. S., 618, which held that the express priority for debts was inserted in the Act of 1867 to recognize and reaffirm the

rights created by the Statue of 1797 "*and to exclude the possibility of a different conclusion.*" Knowing, therefore, that there was this possibility of a "different conclusion," what possible reason could there be for Congress deliberately to fail to recognize or create the priority for the United States *in so many words* as was done in the 1867 Act. Why should the express priority of the Act of 1867 have been eliminated unless Congress intended to eliminate the right itself.

It now will be shown that the definitions contained in the act and the application of the provisions of Section 64 do not forbid the adoption of the foregoing conclusion as suggested by the opinion in the *Tidewater* case.

POINT III.

A. The Act of 1898 despite the definitions therein contained is not free from ambiguity as to the status of debts due the United States and therefore the prior acts and the history of the Act of 1898 can be resorted to for the purpose of resolving the ambiguity.

Section 1a of the Bankruptcy Act provides as follows:

> "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows * * *
>
> (6) 'Corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association.
>
> (19) 'Persons' shall include corporations, ex-

> cept where otherwise specified, and officers, partnerships, and women, and when used with refereene to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors or trustees, or other similar controlling bodies of corporations."

Assuming that the United States is a corporation sovereign, it is submitted that the definition of corporations above set forth was not intended to include the United States, but by its very language was limited to private corporations, joint stock companies, limited partnerships or other partnership associations organized under the laws of the various states in all of which there was a right of succession and in some of which a limited liability of the members as contrasted with powers and privileges of individuals and partnerships. Congress, of course, realized that the laws of the various states differed in their terminology with respect to organizations which were not strictly private corporations and not the ordinary partnership and therefore used the language quoted to cover those classes of organizations of which the essential features were continuity and in some limited liability. In view of the fact that throughout the Act the states and the United States are referred to in *haec verba* it is not believable that Congress would have failed specifically to include the United States and the States in so many words if it had intended that they or either of them should be included within the definitions just as certain partnership associations were thus included in the definition. It is not believable that Congress would have left the rights of the United States or the States to be asserted by mere implication. Certainly it is a peculiar "judicial process" which leads to the conclusion that these definitions *without any doubt* include the United States and therefore eliminates the pos-

sibility of examining the history of the legislation and the Act as a whole as an aid in construing what must certainly be considered at least an ambiguity as to the scope of the definition and as to whether the definition is inconsistent with the context. As above indicated in numerous places throughout the Act, Congress has referred to the United States by name and specifically in Section 64 has created a priority for the United States and the States for taxes. Consequently the failure of Congress in so many words to create a priority for ordinary debts in the very section which specifically creates such a priority for taxes is most persuasive evidence of Congressional intention that the priority for debts should not exist. And yet the Referee finds not the slightest ambiguity or doubt and by a most technical application of definitions and without regard to the context of the very section, he has determined that no reference can be made to the prior Act and their interpretation by the Courts and to the history of the particular Act under construction.

An examination of the Act as a whole shows the use of the word "person" time and again under circumstances, where it is entirely clear that no sovereign corporation was intended to be included and where the intention was to include only natural persons, strictly private corporations and those bodies which possessed some of the attributes of a partnership and some of a private corporation. For example:

Section 2, subdivision 16 provides that the court of bankruptcy has power to punish "persons" for contempt.

Section 3 (a) provides what acts of bankruptcy by a "person" shall consist of.

Section 4 of the original Act of 1898 (30 Stat. 544) provided that any person, except a corporation, could become a voluntary bankrupt, and Section 4 (b) in the

original Act provided that any natural person, except certain specified individuals and certain corporations engaged in certain lines of business, might be adjudged an involuntary bankrupt, and of course here there would be included not only a strictly private corporation, but also in pursuance of the definition bodies engaged in those lines of business having the attributes of a private corporation (such as joint stock associations and partnership associations).

The present act as amended by the Acts of 1903 and 1910 extends the right to file a voluntary petition to any person *except* certain classes of corporations and extends the class of corporations against which petitions may be filed [as the United States and a State are not specifically excluded, under the reasoning of the Referee a State or the United States being corporations not within the excepted class could file voluntary petitions].

Section 16 (a) provides that the liability of a "person" who is a co-debtor with or guarantor for the bankrupt shall not be discharged.

Section 20 (b) provides any person conscientiously opposed to the taking of an oath may in lieu thereof affirm.

Section 29 in all its subdivisions provides that a "person" may be punished for offenses under the Act.

In the light of the foregoing, can it be seriously argued that the court is bound to hold that there is no possible room for construction; that "persons" in Section 64 *without doubt includes the United States and that it must shut its eyes to the history of the past and present acts in ascertaining the true intent of Congress in continuing the priority for "persons" which originated in the Act of* 1841.

In construing definitions and their application, the courts cannot close their eyes to the fact that the use of definitions in statutes is a comparatively modern inno-

vation and frequently leads to confusion because the definitions give a non-natural sense to words which are afterwards used in a natural sense without regard to the distinction. In the absence of definitions which specifically include the United States or a state within the meaning of the word "person," the court must be free to examine the history of the legislation in order to ascertain the true legislative intent.

POINT IV.

A failure of Congress to create a priority for ordinary debts due the United States is in accordance with an enlightened and desirable public policy and the Courts should not be astute to spell out an intent to the contrary. The losses which the government sustains in excess of its pro rata share of the assets should not be borne by the other creditors of the bankrupt but by all the people.

POINT V.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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